

2007

Dennis Moler and Marilynn Moler v.Christopher McCandless : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Dennis Moler and Marilynn Moler v.Christopher McCandless*, No. 20070048 (Utah Court of Appeals, 2007).
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IN THE UTAH SUPREME COURT

DENNIS MOLER, an individual, and
MARILYNN MOLER, an individual,

Plaintiffs/Appellants,

v.

CHRISTOPHER McCANDLESS, an
Individual, and CW MANAGEMENT
CORPORATION, a Utah Corporation,

Defendants/Respondents.

**APPELLANTS' OPENING
BRIEF**

Supreme Ct. Case No. 20070048

**ON INTERLOCUTORY APPEAL FROM
THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, JUDGE MEDLEY**

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UTAH APPELLATE COURTS

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JURISDICTION

This is an appeal from an interlocutory order of the Third District Court, Salt Lake County. Pursuant to Rule 5 of the Utah Rules of Appellate Procedure, on March 20, 2007 this Court entered an Order granting the Molers' Petition for Permission to Appeal an Interlocutory Order (R. 1770). This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

ISSUES ON APPEAL

(1) Whether the trial court erred by failing to conclude that Ms. Moler-Lewis is a “representative” of her parents under Utah Rule of Evidence 504(a)(4) whose communications with her parents and their counsel are therefore protected by the attorney-client privilege; and

(2) If Ms. Moler-Lewis is a “representative” for purposes of Rule 504(a)(4), whether the trial court erred by holding that the Molers waived the privilege by testifying about conversations predating their appointment of Ms. Moler-Lewis as their representative.

The Molers preserved these issues below by: (a) refusing to allow Mr. Moler to testify about conversations with his daughter relating to the litigation after the commencement of litigation (See R. 1178-79 (deposition testimony of Dennis Moler)); and (b) by opposing Defendants’ motion to compel documents and testimony reflecting such conversations (See R. 1154-1206).

Under Utah law, “the existence of a privilege is a question of law for the court,” and the trial court’s ruling on the existence of a privilege is “review[ed] for correctness, giving no deference to the trial court's determination.” State v. Anderson, 972 P.2d 86, 88 (Utah Ct. App. 1998) (quoting Price v. Armour, 949 P.2d 1251, 1254 (Utah 1997)).

The trial court's finding that a privilege was waived is also a legal conclusion that is reviewed, "for correctness." Doe v. Maret, 1999 UT 74, ¶ 6, 984 P.2d 980 (Utah 1999).

DETERMINATIVE RULES

The following Rules of Evidence are determinative of this appeal, or are of central importance to this appeal:

- (1) Utah Rule of Evidence 504(a)(1): A “client” is a person, including a public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.
- (2) Utah Rule of Evidence 504(a)(4): A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter.
- (3) Utah Rule of Evidence 504(a)(5): A "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client and the client's representatives to the lawyer or the lawyer's representative incidental to the professional relationship.
- (4) Utah Rule of Evidence 504(a)(6): A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to

the client or those reasonably necessary for the transmission of the communication.

- (5) Utah Rule of Evidence 504(b): General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.
- (6) Utah Rule of Evidence 504(c): Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication is presumed to have authority to claim the privilege on behalf of the client.
- (7) Utah Rule of Evidence 507(a): A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication

waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure. This rule does not apply if the disclosure is itself a privileged communication.

STATEMENT OF THE CASE

In early 2002 the Defendants were actively marketing a new residential planned unit development in Sandy, Utah, known as Redfeather Estates. A key component of Defendants' marketing was the fact that residency in Redfeather was and always would be limited to households where at least one person was 55 years of age or older. When Defendants obtained plat approval from the Sandy City Planning Commission, Defendants were instructed to include the age restriction within the Redfeather Covenants, Conditions & Restrictions ("CC&Rs"). Accordingly, the age restriction was stated and restated throughout the original Redfeather CC&Rs, and was mentioned prominently in Redfeather advertising materials.

Dennis Moler spent more than thirty-five years as an agent in the Federal Bureau of Investigation. In 2002, when his retirement was imminent, he and his wife Marilyn began looking to build a home in a community consisting of homeowners fifty-five years or older. In March 2002, the Molers became aware of Redfeather Estates and contacted McCandless to discuss the possible purchase of a residence. During this initial conversation—and in every conversation that occurred thereafter—McCandless represented to the Molers that Redfeather Estates was solely for individuals over fifty-five years of age. The Molers and McCandless then met on numerous occasions to discuss this possible purchase. During those conversations, McCandless stated that

Redfeather Estates would be the first gated community in Sandy for individuals over fifty-five years of age, and showed the Molers how the residences were being constructed for mature adults. The Molers were sold. This was the home—and the community—in which they expected to spend the rest of their lives.

On April 23, 2002, the Molers and Franklin Homes¹ executed a Real Estate Purchase Contract (the “Contract”) for construction of a home in Redfeather Estates. The Contract called for the Molers to pay \$215,900.00 for a residence to be constructed at Redfeather Estates. The Molers provided a \$1,000 earnest money deposit on that date in accordance with the terms of the Contract. During that meeting McCandless repeatedly mentioned the 55 and over restriction, and he read through the Original CC&Rs with the Molers. The Contract expressly incorporated several other documents, including the Original CC&Rs that expressly limited Redfeather Estate ownership to individuals over fifty-five years of age. The Contract established October 30, 2002 as the “Substantial Completion Deadline.” Closing was scheduled for two days after the Molers received notice that construction was substantially complete. On May 22, 2002, the Molers met with Defendants, discussed various aspects of construction, and provided Franklin Homes

¹ Franklin Homes and its principal Quinn Heder, as well as Sunrise Capital, were named defendants in this action at the time the order at issue was entered by the trial court, but both have since been dismissed as a result of a settlement.

with a check for \$20,590 as required by the Contract. At no time during this meeting did any Defendant indicate that the fifty-five and over age restriction would be removed.

Yet unbeknownst to the Molers, at that very moment Defendants were engaging in unilateral efforts to change Redfeather Estates' very nature. Persons under the age of 55 were expressing interest in Redfeather, and Defendants were growing increasingly desperate to sell homes. Thus, as early as April 16, 2002, the Defendants were discussing in their weekly project meetings the idea of lifting the age restriction to speed up sales. By May 14, 2002—a week before the Molers made their \$20,000 payment to Defendants as scheduled—Defendants were already planning to petition Sandy City to remove the age restriction. None of the Defendants ever told the Molers that Defendants were taking steps to remove the age restriction—the very thing that brought the Molers to Redfeather in the first place.

Despite their failure to notify the Molers of their intent to remove the age restriction, on June 20, 2002, McCandless met with the Sandy City Planning Commission to obtain approval to remove Redfeather Estates' fifty-five year or older age restriction. McCandless advised the Planning Commission that he had several potential buyers who are not yet 55 years of age but desire to live in the project, and under the current project approval and CC&Rs he was prohibited from selling to these individuals. The Planning Commission agreed to McCandless' request subject to the approval of Redfeather

owners. No such approval was ever sought, let alone obtained, from the Molers or any other homeowner.

After convincing Sandy City that the nature of Redfeather Estates needed to be changed to increase sales, Defendants took the next step. On August 12, 2002, Defendants executed and recorded “An Amendment to the Declaration of Covenants, Conditions, and Restrictions and Reservation of Easements for Redfeather Estates, P.U.D.” (the “First Amended CC&Rs”). The First Amended CC&Rs, among other things, purported to remove from the Redfeather Estate CC&Rs “any and all references to age restriction or minimum age.” Unaware of this sea-change that had been made to their community, on September 26, 2002, the Molers upheld their end of the bargain by providing the remaining amounts due under the Contract and closed on the purchase of their residence.

The Defendants never advised the Molers of the First Amended CC&Rs or that the fifty-five and over age restriction had been removed. Instead, the Defendants took affirmative steps to conceal what they had done. For example, in early 2005 Mr. McCandless visited Redfeather and spoke with the Molers at their home. The Molers and their daughter, Wendy Moler-Lewis, asked Mr. McCandless directly whether Redfeather was still a 55 and over community. Twice Mr. McCandless unequivocally responded: “yes.” Because she was privy to these and other communications relevant to the Molers’

allegations, Ms. Moler-Lewis is a fact witness in this lawsuit. Although Ms. Moler-Lewis graduated from law school and was at one time a practicing attorney, she has never represented her parents in this action and has never purported to do so.

The Molers eventually learned the truth about what the Defendants had done. After unsuccessful efforts to resolve their disputes with the Defendants without litigation, the Molers decided to pursue legal action. Because they were unfamiliar with civil litigation, they empowered Ms. Moler-Lewis to identify a law firm to assist them with their dispute. After counsel was retained, Ms. Moler-Lewis remained actively involved in the litigation and was privy to numerous communications between her parents and their counsel. The Molers' Complaint, filed on February 13, 2006, alleged breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, fraudulent concealment, negligent misrepresentation, and violation of Utah's deceptive trade practices statute.

Defendants moved to dismiss the Molers' complaint, and in the alternative for summary judgment, but the trial court denied both motions. (R. 598-600.) Discovery then proceeded, with all parties serving written discovery and taking depositions. During Defendants' deposition of Dennis Moler, counsel for McCandless and CW Management asked Mr. Moler to describe in detail all communications he has had with Ms. Moler-Lewis concerning this lawsuit, including those where counsel was present. Counsel for

the Moler's objected and instructed Mr. Moler not to answer. Defendants then moved to compel communications between Ms. Moler-Lewis and her parents concerning the litigation (R. 977-979A), and the Moler's opposed the motion (R. 1154-1206). The court heard oral argument and, a few days later, granted Defendants' motion to compel. (R. 1378-1381.) The Moler's then petitioned this Court for leave to file an interlocutory appeal, which petition was granted on March 22, 2007. (R. 1770-1770A.)

SUMMARY OF ARGUMENTS

Utah Rule of Evidence 504 extends the attorney-client privilege to representatives of the client. In reliance upon the express language of Rule 504, the Molers appointed their daughter, Wendy Moler-Lewis, as their representative in connection with this litigation. In that capacity Ms. Moler-Lewis was authorized to, and did in fact, identify legal counsel to represent her parents, and then participated actively in strategic decisions concerning the litigation. Ms. Moler-Lewis was privy to communications between her parents and their counsel, received and reviewed drafts of pleadings, and discussed the lawsuit with her parents. At all times the Molers, their counsel, and Ms. Moler-Lewis were operating under the assumption—grounded in the express language of Rule 504—that these communications were privileged as Ms. Moler-Lewis was acting as her parents’ representative.

Hence, when counsel for the Defendants in this action asked Mr. Moler questions in his deposition about conversations he had with his daughter about the lawsuit, counsel for the Molers objected and instructed Mr. Moler not to answer. Defendants then moved to compel the production of documents and testimony reflecting communications between the Molers and their daughter, including communications to which the Molers’ counsel were parties, after Ms. Moler-Lewis was appointed as her parents’ representative. The Molers opposed Defendants’ motion primarily on the ground that the

communications were privileged under Rule 504 because Ms. Moler-Lewis was a duly-appointed litigation representative of her parents. The trial court granted the motion to compel, but never addressed whether Ms. Moler-Lewis was a “representative” as expressly provided for under Rule 504. The trial court instead concluded (1) that Ms. Moler-Lewis was not an “agent” of her parents because her services were not necessary for the provision of legal services, and (2) even if Ms. Moler-Lewis was an agent, the Molers waived any privilege when Mr. Moler was allowed to testify about conversations with his daughter that predated the commencement of litigation and the hiring of counsel.

The trial court’s rulings are legally incorrect for two reasons. First, Rule 504 speaks only in terms of representatives—not agents—and nowhere requires that the representative’s services be absolutely necessary for the provision of legal services. Second, the Molers could not have waived any privilege by testifying about conversations occurring before litigation commenced, because until litigation commenced or was imminent and counsel was retained, no attorney-client privilege existed under Rule 504. Thus, the Molers could not have refused to testify regarding the communications with their daughter that predated the hiring of counsel, or their appointment of her as their litigation representative.

Because the trial court's order requires the Molers to disclose communications that are privileged under the express terms of Rule 504, the trial court's rulings are in error and should be reversed.

FACTUAL STATEMENT

A. Dennis & Marilynn Moler

1. Dennis and Marilyn Moler (the “Molers”), the plaintiffs in this case, had never been involved in civil litigation before this lawsuit. See R. 1169 (Affidavit of Dennis Moler (“Moler Aff.”)) ¶ 4.

2. The Molers have three daughters, one of whom is Wendy Moler-Lewis. Id. (R. 1169) ¶ 3.

B. Wendy Moler-Lewis

3. Wendy Moler-Lewis received her juris doctorate degree from Creighton University Law School in 1999. See R. 1173 (Affidavit of Wendy Moler-Lewis (“Lewis Aff.”)) ¶ 4.

4. Shortly thereafter, Ms. Moler-Lewis became a member of the Utah Bar and joined VanCott Bagley Cornwall & McCarthy (“Van Cott”) for approximately three years as a litigation associate. Ms. Moler-Lewis left VanCott several years ago to help run her husband’s dental practice. Id. (R. 1173) ¶ 5.

5. While employed at Van Cott, Ms. Moler-Lewis worked and became friendly with Evan S. Strassberg, who was also a litigation associate at the time. Mr.

Strassberg and Ms. Moler-Lewis have maintained a personal friendship since that time.

Id. (R. 1173) ¶ 6.

6. In the 2002-2005 time period, because the Molers watched Ms. Moler-Lewis' daughter, Ms. Moler-Lewis was frequently at the Molers' residence and was well aware of their various efforts to deal with Defendants' fraud and other wrongful acts. Id. (R. 1173) ¶ 7.

C. Ms. Moler-Lewis is a Representative of her Parents in this Litigation.

7. In December 2005, as it became clear that litigation was inevitable, Ms. Moler-Lewis—at her parents' express request and authorization—helped her parents look for and select counsel to help them handle the litigation. Ms. Moler-Lewis telephoned at least two Salt Lake attorneys on her parents' behalf. Id. (R. 1173) ¶ 8; Moler Aff. (R. 1169) ¶ 5.

8. During that same time period, Ms. Moler-Lewis received an announcement from Mr. Strassberg stating that he and Mr. Ensor were forming a law partnership. Lewis Aff. (R. 1174) ¶ 9.

9. Shortly thereafter, and based on her personal and professional relationship with Mr. Strassberg, Ms. Moler-Lewis called Mr. Strassberg and briefly explained the facts of her parents' case. Mr. Strassberg indicated he was interested in discussing the

matter further, and Ms. Moler-Lewis set up an in-person meeting with Mr. Strassberg and the Moler. Id. (R. 1174) ¶ 10.

10. The initial meeting between Mr. Strassberg and the Moler took place at the Moler's home in Redfeather Estates, which Ms. Moler-Lewis also attended. Id. (R. 1174) ¶ 11; Moler Aff. (R. 1169) ¶ 7.

11. At all relevant times, dating back to at least December 2005, Ms. Moler-Lewis had the authority to obtain professional legal services, and to act on any advice rendered pursuant thereto, on behalf of her parents. Ms. Moler-Lewis has also been specifically authorized to communicate with Strassberg & Ensor on this matter, and has done so on numerous occasions. Moler Aff. (R. 1169) ¶ 8; Lewis Aff. (R. 1174) ¶ 12.

12. Among other things, Ms. Moler-Lewis has spoken with her parents about drafts of pleadings prepared by Strassberg & Ensor, and has discussed with them strategic matters pertaining to the lawsuit. Moler Aff. (R. 1170) ¶ 9; Lewis Aff. (R. 1174) ¶ 13.

13. Mr. Moler never intended to waive the attorney-client privilege by communicating with Ms. Moler-Lewis about the lawsuit. Moler Aff. (R. 1170) ¶ 10.

D. Ms. Moler-Lewis was a Client of Strassberg & Ensor, P.C.

14. Ms. Moler-Lewis retained Strassberg & Ensor P.C. (now known as Young, Hoffman, Strassberg & Ensor, LLP) to represent her in relation to this matter, in particular in regard to her role as a witness and in response to Defendants' threats that a

claim for defamation might be filed. Ms. Moler-Lewis' attorney-client relationship with Strassberg & Ensor began in January 2006. Lewis Aff. (R. 1174) ¶ 14.

E. Dennis Moler's Deposition

15. On October 10, 2006, Defendants deposed Dennis Moler. (R. 1177.)

16. Defendants' counsel asked Mr. Moler several questions about conversations with his daughter, Wendy Moler-Lewis, in regard to Ms. Moler-Lewis' involvement with this litigation. (R. 1178-79.)

17. Plaintiff's counsel objected to, and instructed Mr. Moler not to answer, questions relating to Wendy Moler-Lewis' actions as the representative of her parents in the current litigation. Id.

18. Plaintiff's counsel's basis for the objection and instruction not to answer was that Ms. Moler-Lewis was a representative of Mr. Moler in regard to Mr. Moler's claims against Defendants and that Plaintiffs' counsel also represented Ms. Moler-Lewis in relation to this matter. Id.

19. Defendants' counsel asked, and received answers to, questions relating to conversations between Mr. Moler and his other daughters in regard to the litigation because these daughters were not acting as the Molers' representative in this matter. (R. 1180.)

20. Defendants' counsel also asked Mr. Moler several questions regarding his conversations with Ms. Moler-Lewis during the 2005-2005 time period, i.e., prior to the litigation. See, e.g., id.

21. Plaintiffs' counsel did not object to questions relating to pre-litigation conversations because during that time period there was no attorney-client relationship, and those communications were not privileged.

F. Defendants' Motion to Compel

22. Defendants moved to compel the production of documents and further deposition testimony disclosing communications between the Molers and their daughter, even when counsel for the Molers was a party to the communications. (R. 977-79.)

23. The Molers opposed that motion on two primary grounds. First, the Molers argued that Wendy Moler-Lewis was, under the express terms of Utah Rule of Evidence 504, a "representative of the client" and therefore the Molers had "a privilege to refuse to disclose and to prevent any other person from disclosing" communications to which she was a party. (R. 1160-63.) Second, the Molers pointed out that Ms. Moler-Lewis was a client of Strassberg & Ensor, whose communications with the lawyers of that firm were therefore privileged. (R. 1162.)

24. On December 28, 2006, the trial court entered an order granting Defendants' motion to compel (the "Order"). (R. 1379-80.) The trial court concluded

that Ms. Moler-Lewis was not an “agent” of her parents, but never addressed whether she was a “representative” as provided for under Rule 504. The trial court further ruled that, even if there were a privilege between the Molers and their daughter, it was waived when Mr. Moler testified in his deposition about conversations predating the commencement of litigation. (R. 1380.)

ARGUMENT

- I. THE PLAIN LANGUAGE OF UTAH RULE OF EVIDENCE 504 ALLOWS MS. MOLER-LEWIS TO BE A “REPRESENTATIVE” OF HER PARENTS, AND HER COMMUNICATIONS WITH COUNSEL AND THE MOLERS WERE THEREFORE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

The fundamental issue presented on this appeal is whether the attorney-client privilege extends to communications that involve the client’s designated representative—in this case, the clients’ daughter. The analysis of this issue begins with the plain language of Utah Rule of Evidence 504, which sets forth this Court’s articulation of the attorney-client privilege.

Utah Rule of Evidence 504(b) states the general rule of privilege:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and client’s representatives, lawyers, lawyer’s representatives, and lawyers representing others in matters of common interest, and among the client’s representatives, lawyers lawyer’s representatives, and lawyers representing others in matters of common interest, in any combination.

[Emphasis added.]

Rule of Evidence 504(a) states in unambiguous terms that the scope of the privilege extends to persons who are deemed “representatives” of the client, and thus makes it clear that conversations between the client and the Client’s Representatives fall

within the scope of the privilege, as do conversations between the attorney and the client's representative. The Rule defines a "representative of the client" as: "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter." *Id.* Noticeably absent from this definition is any requirement that the assistance of the representative be "necessary" to the representation, or require that the representative be the equivalent of a legal "agent."

The Moler and their counsel relied upon the plain language of Rule 504 when the Moler appointed Ms. Moler-Lewis as their representative, and shared with her privileged communications regarding the Moler's representation. The Moler presented evidence to the trial court establishing that Ms. Moler-Lewis had authority to, and did in fact, obtain legal services for her parents, and was authorized to communicate with Strassberg & Ensor concerning the Moler's lawsuit. (Moler Aff. (R. 1169) ¶¶ 5, 8; Moler-Lewis Aff. (R. 1173-1174) ¶¶ 8, 12.) That evidence was unrebutted by Defendants. Indeed, the very creation of the attorney-client relationship was the result of Ms. Moler-Lewis' authorized actions on her parents' behalf. (Moler-Lewis Aff. (R. 1173) ¶ 8 ("In approximately December 2005, as it became clear that litigation was inevitable, my parents asked me to help them identify and retain counsel to help handle the litigation."))

Ms. Moler-Lewis has also been involved in meetings and conversations between counsel and the Molers, and she helped review pleadings before they were filed. (Id. ¶ 13.) She has on her own communicated with attorneys in connection with the lawsuit. (Id. ¶¶ 12-13.)

When performing all these acts, Ms. Moler-Lewis was acting with the consent and knowledge of her parents. (Id. ¶ 12; Moler Aff. (R. 1169) ¶ 8.) Moreover, it is undisputed that Ms. Moler-Lewis is herself a client of Strassberg & Ensor. (Moler-Lewis Aff. (R. 1174-1175) ¶ 14.) Thus, all communications between Strassberg & Ensor and Ms. Moler-Lewis, and all communications between the Molers and their daughter relating to the substance of this litigation, are privileged.

The only circumstance in which this Court has held that the issue of “necessity” is relevant to a claim of privilege is wholly inapposite to the present situation. In Hoffman v. Conder, 712 P.2d 216 (Utah 1985), this Court addressed whether the presence of a nurse during a conversation between Mark Hoffman and his counsel resulted in a waiver of the attorney-client privilege. This Court concluded that, “[t]he proper standard is whether the third person’s presence is reasonably necessary under the circumstances.” Id. at 216-17. The Hoffman case did not address the situation presented here: whether a designated representative of a party is included within the scope of the attorney-client privilege.

Because the applicable rule (504(a)(4)) does not state that necessity is required, and does not provide that the representative must constitute a legal “agent,” those terms should not be added by judicial decree. Members of the bar rely upon the plain language of the rules when determining with whom they can, and cannot, share privileged communications, and when advising their clients on these issues. Given the harm that flows from being forced to disclose to an adverse party communications that the rule states is protected from disclosure, the language of the rule must govern.

If this Court had intended to include in the definition of a “representative of a client” a requirement that the representative’s assistance be “reasonably necessary under the circumstances,” or that the “representative” actually be an agent—a legal term of art with which the Court is undoubtedly familiar—such language would have been included in the rule itself. In fact, the phrase “reasonably necessary” appears in Rule of Evidence 504(a)(6), which defines a communication as confidential if, “not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” (Emphasis added.) Here, because Ms. Moler-Lewis was a representative of her parents, the communications between and among the Molers, their counsel, and Ms. Moler-Lewis were by definition “in furtherance of the rendition of professional legal services to the client...”, and thus there is no need to ask

whether Ms. Moler-Lewis' presence was "reasonably necessary for the transmission of the communication." Indeed, the communications Defendants moved to compel included "questions about whether Ms. Moler-Lewis assisted Mr. Moler and/or his counsel by reviewing the Complaint, Interrogatories, and Mr. Moler's letters to the parties and others ... about the matters in dispute." (R. 981-982.) Such communications are related to "the rendition of professional legal services," and Defendants have never argued a contrary position.

Even if the Molers were required to demonstrate that Ms. Moler-Lewis' participation in attorney-client communications was "reasonably necessary," the undisputed record evidence establishes this was the case. Mr. Moler testified in his affidavit that, prior to this lawsuit, the Molers "were never involved in civil litigation." (Moler Aff. (R. 1169) ¶ 4.) Because the Molers were unfamiliar with the civil process and civil attorneys, they asked their daughter, a law school graduate who practiced law for several years, to help identify and select counsel and to assist with this litigation. (Id. ¶ 6.) Thus, even if the Molers were required to show "reasonable necessity," the un rebutted testimony before the trial court demonstrates that Ms. Moler-Lewis' participation in the litigation process was "reasonably necessary" under the circumstances. Defendants proffered no evidence to the contrary.

Finally, ensuring the protection of the communications at issue in this case is wholly consistent with the policy underlying the attorney-client privilege. As this Court has recognized, “[t]he attorney-client privilege ‘is intended to encourage candor between attorney and client and promote the best possible representation of the client.’” Doe v. Maret, 1999 UT 74, ¶ 7, 984 P.2d 980, quoting Gold Standard, Inc. v. American Barrick Resources (USA), Inc., 901 P.2d 909, 911 (Utah 1990). The communications between and among the Moler, their daughter, and their counsel served but a single purpose: to ensure that the Moler obtained the best possible representation. There is nothing sinister or subversive about the Moler’s desire to have their law degree-holding daughter look over the shoulders of their counsel, particularly given the Moler’s inexperience in civil litigation.

The attorney-client privilege extends to Ms. Moler-Lewis, and Defendants should be denied the opportunity to discover any communications between and among the Moler, their counsel, and Ms. Moler-Lewis.

II. BECAUSE NO PRIVILEGE EXISTED UNTIL MS. MOLER-LEWIS BEGAN SPEAKING WITH ATTORNEYS ON HER PARENTS' BEHALF, MR. MOLER DID NOT WAIVE THE PRIVILEGE BY TESTIFYING TO CONVERSATIONS WITH HIS DAUGHTER PRECEDING THE RETENTION OF COUNSEL.

The trial court ruled that, even if Ms. Moler-Lewis were an “agent” of her parents, any privilege was waived when Mr. Moler testified about conversations with Ms. Moler-Lewis that pre-dated her appointment as a representative.

Utah Rule of Evidence 507(a) provides that waiver of a privilege occurs only where “the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of *any significant part of the matter or communication*, or fails to take reasonable precautions against inadvertent disclosure.” Utah R. Evid. 507(a) (emphasis added). It is black letter law that testimony cannot constitute a waiver unless the testimony concerns the subject matter of a privileged communication. Hence, testimony to conversations that predate the existence of an attorney-client relationships cannot possibly give rise to a waiver. The Molers’ counsel did not object to questions about communications between Mr. Moler and his daughter that pre-dated the creation of the attorney-client relationship because no privilege existed to protect those conversations. During the time period at issue (all times preceding Ms. Moler-Lewis’ December phone calls with prospective attorneys), Ms. Moler-Lewis was not acting as

her parents' lawyer and counsel had not been retained, so there was no attorney-client relationship to which any privilege could have attached.

In fact, before December 2005, there were no attorney-client communications at all, so Mr. Moler could not have disclosed "any significant part of the matter or communication" that is protected by the privilege by testifying about conversations before that date. Because Ms. Moler-Lewis was not acting as her parents' attorney or representative before December 2005, Mr. Moler answered questions regarding conversations with her parents predating December 2005 that were wholly unrelated to a legal representation *that had not even begun*.

Specifically, the communications Defendants argued below gave rise to the waiver were "conversations [between Mr. Moler and] Ms. Moler-Lewis about his position on the Redfeather Homeowners Transition Committee, in light of his concerns about the CC&Rs." (R. 988.) While it is unclear precisely what testimony Defendants are referring to, and Defendants did not quote or attach any of Mr. Moler's testimony about these matters to either their original memorandum or reply,² conversations about Mr. Moler's involvement in the Redfeather Homeowners' Association that predated any

² In their memoranda below, Defendants did not identify the specific portion of the deposition transcript to which they referred, nor did they attach any portion of the transcript to support their waiver argument. This complete lack of evidence to support Defendants' waiver argument is another reason why the trial court's ruling was in error and should be reversed.

attorney-client relationship could not possibly give rise to a waiver. The Molers' counsel objected to all questions concerning communications with Ms. Moler-Lewis after the attorney-client relationship was formed, during which Ms. Moler-Lewis was acting as representative or agent to the current litigation because, as discussed above, those communications are protected as privileged under Rule 504. No waiver occurred.

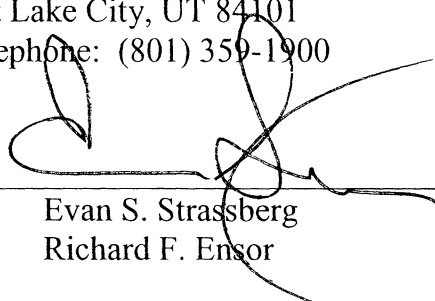
CONCLUSION

For the foregoing reasons, the Molers respectfully request that this Court REVERSE the trial court's order granting Defendants' motion to compel.

DATED this 29th day of May, 2007.

YOUNG, HOFFMAN, STRASSBERG & ENSOR, LLP
170 South Main Street, Suite 1125
Salt Lake City, UT 84101
Telephone: (801) 359-1900

By



Evan S. Strassberg
Richard F. Ensor

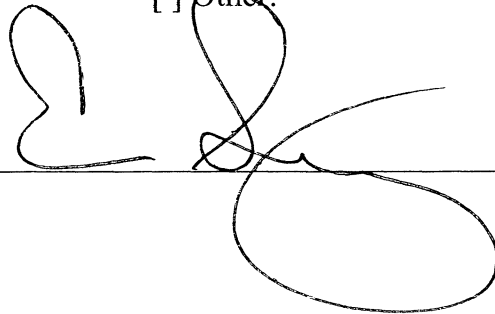
**COUNSEL FOR PLAINTIFFS AND APPELLANTS
DENNIS MOLER AND MARILYNN MOLER**

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that on this 29th day of May, 2007, a true and correct copy of the foregoing was served upon the person(s) named below, in the manner indicated:

Lincoln W. Hobbs, Esq.
Lisa M. McGarry, Esq.
Hobbs & Olson, L.C.
466 East 500 South, Suite 300
Salt Lake City, Utah 84111

☒ U.S. Mail
☐ Federal Express
☐ Hand-Delivery
☐ Telefacsimile
☐ Other:



A handwritten signature in black ink, appearing to read 'L. W. Hobbs', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

ADDENDUM

CONTENTS OF ADDENDUM

Document	Tab Number
Oral Ruling of November 8, 2006	1
Order on Motions to Compel and Motion for Protective Order	2

Tab 1

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DENNIS MOLER, et al.,	: Case No. 060902661
	:
Plaintiffs,	:
	:
v	:
	:
SUNRISE CAPITAL, LLC, et al.,	:
	:
Defendants.	:

RULING NOVEMBER 8, 2006

BEFORE

THE HONORABLE TYRONE E. MEDLEY

FILED DISTRICT COURT
Third Judicial District

NOV 20 2006

By bn SALT LAKE COUNTY
Deputy Clerk

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

ORIGINAL

APPEARANCES

For the Plaintiff:

RICHARD F. ENSOR
EVAN S. STRASSBERG
Attorneys at Law

For the Defendant:

LINCOLN W. HOBBS
JULIE LADEL
BART KUNZ
Attorneys at Law

* * *

1 SALT LAKE CITY, UTAH - NOVEMBER 8, 2006
2 HONORABLE TYRONE E MEDLEY, JUDGE PRESIDING
3 (Transcriber's note: Speaker identification
4 may not be accurate with audio recordings)
5 PROCEEDINGS TELEPHONICALLY
6 THE COURT: Okay. Are both - are all three of you
7 still there rather?
8 MR. STRASSBERG: Yes.
9 MR. HOBBS: Yes.
10 THE COURT: Four. Okay. We should be on the
11 record at this time, and this is case numbered 060902661.
12 And let's start by having counsel identify themselves for the
13 record starting with counsel for plaintiffs.
14 MR. STRASSBERG: Evan Strassberg and Rick Ensor on
15 behalf of plaintiffs, and plaintiffs Dennis and Marilyn
16 Moler, are with us.
17 THE COURT: Counsel for defendants. Go ahead.
18 MR. HOBBS: Lincoln Hobbs and Julie Ladel are here,
19 and Bart Kunz is here representing Sunrise/Frequent Homes and
20 Quint Heeder.
21 THE COURT: Okay. Thank you, counsel. As you
22 know, this is the time that I set for ruling on the three
23 motions that I have currently pending before me, and I am
24 going to do that at this time. I'm going to go - and let me
25 initially say that - I guess I'm going to shift the

1 responsibility to those parties who I've ruled in their favor
2 to draft the order consistent with the ruling I'm about to
3 announce unless you think you can collectively put together a
4 joint order that you can stipulate to. That would be better
5 for me. But in the event you can't do that, then the
6 prevailing party will prepare the appropriate order.

7 Let me go first to the defendant's motion for a
8 protective order. Let me state first that I am going to deny
9 the Defendant's Motion for a Protective Order. I'm doing
10 that because I am unable to find, based upon what's been
11 presented to me, that there has been a violation of Rule 4.2
12 - I think it's subsection (d). That rule expressly states
13 that when the represented person is an organization, an
14 individual is represented by counsel for the organization if
15 the individual is not separately represented with respect to
16 the subject matter of the representation. And in this case,
17 I'm finding that Mr. Cannon elected to be represented by his
18 own counsel. Therefore, the contact that occurred between
19 Mr. Strassberg and Mr. Ensor with Mr. Cannon through his
20 retained counsel was not in violation of Rule 4.2(d).

21 Let me also state that I've been invited by counsel
22 for the defendants to exercise this court's inherent powers
23 and authority to manage the practice of law before the court
24 and officers of the court in an effort to maintain the
25 integrity of trial proceedings, and under the facts and

1 circumstances that have been presented to me in the context
2 of this motion, I don't believe there are sufficient grounds
3 for me to exercise that discretion. I'm doing so primarily
4 because of the express language in Rule 4.2(d). In my view,
5 that rule - it attempts to strike a balance between some
6 competing interests, and I would note certainly that the
7 balance that it attempts to strike I think is appropriate,
8 and to the extent it isn't clearly - it's a legislative or
9 rule making problem and not under the facts presented, a
10 problem for this Court. I do think that there may very well
11 be a set of circumstances out there where the court should
12 exercise it's inherent authority, but I can't find that this
13 case presents such a set of circumstances. But I am
14 satisfied, however, that the motion - Defendant's Motion for
15 Protective Order is not frivolous, not meritless, and in
16 fact, while I think motions attempting to maintain that
17 opposing counsel has violated ethical rules should not be
18 made lightly, I don't find that this motion was, in fact,
19 made lightly, and I think it was appropriate to bring the
20 motion so this Court can have an opportunity to determine
21 whether or not in a given set of circumstances it is
22 appropriate for the court to exercise its inherent power. So
23 this rule was - is in my view, is far from meritless. But at
24 the same time, I'm resolving it by relying on the express
25 language of the ruling and the circumstances which occurred

1 here. So I am denying that motion. And inconsistent with
2 the Plaintiff's request, I'm not awarding attorney's fees as
3 it relates to that motion.

4 I'd like to go next now to the Plaintiff's Motion
5 to Compel. I've really struggled with this motion. But in
6 the end, I've decided that I'm going to grant the Plaintiff's
7 Motion to Compel because I am satisfied that in light of
8 their pleadings, particularly their fraud claims, that this
9 request is reasonably calculated to lead to admissible
10 evidence which I think is the standard. Additionally, I am
11 finding that I am not persuaded by the defendants' position
12 that this request seeks irrelevant documents or that it is
13 unduly burdensome. I am concerned about this kind of a
14 request because clearly, it is broad enough that there is the
15 risk that it could involve documents which have nothing
16 involved with this particular case. I think that's pretty
17 clear on its face. But in granting this motion, I am going
18 to limit this request for discovery to only those files that
19 are known to have Red Feather estate documents in them. That
20 was a - and I'll just call it a suggestion that the
21 plaintiffs made in their memoranda, and I am going to add
22 that limitation. But with that limitation and combined with
23 the fact that I was not persuaded, for example, that this
24 request is unduly burdensome in terms of just pure volume.
25 If I'd been persuaded of that, I would have been more likely,

1 I think, to deny this motion to compel, because of its broad
2 nature on its face, but without being persuaded that its
3 unduly burdensome by way of just sheer volume, I'm not
4 persuaded that the defendants' position that it's unduly
5 burdensome because of some of the confidential nature of some
6 of the documents. I'm going to find that that issue can be
7 attenuated by the protective order that the parties have
8 stipulated to in this particular case. So I am going to
9 grant the Plaintiff's Motion to Compel.

10 Going next to the Defendants' Motion to Compel, let
11 me say that I am going to also grant the Defendants' Motion
12 to Compel. In granting that Motion to Compel, it also
13 includes granting of the enlargement of time of two hours to
14 continue the deposition. And I'm granting this motion,
15 because I'm of the opinion that the communications between
16 Mr. Moler and his daughter are not protected by the
17 attorney/client privilege. She is not aware, did not provide
18 legal advise based upon Mr. Moler's own admission in this
19 Court's opinion. He is not her client. I think it was in
20 some deposition testimony, Mr. Moler acknowledged that she
21 was not his attorney. So in my view, the communications of
22 Mr. Moler and his daughter are not protected by the
23 attorney/client privilege.

24 Additionally to the extent - even if I were to find
25 that there was such protection, I would, as suggested by the

1 defendants, find that Mr. Moler waived the privilege. Even
2 though, in my opinion it doesn't exist by his responses to
3 the questions in the deposition, itself.

4 It has been suggested that these communications are
5 still protected because Ms. Moler-Lewis - and I think that is
6 her last name - is an agent. And I'm going to find that is
7 not the case in that under this set of circumstances, because
8 I can't find the - that she was necessarily for the retention
9 of the legal advise, nor that she was essential to
10 plaintiff's representation, and in order for that to occur -
11 and let me back up a second. It is suggested by counsel for
12 the plaintiffs that the common interest doctrine applies in
13 this particular case and from my review of the case cite, I
14 would agree that the controlling authority requires that that
15 common interest be identical. In this Court's opinion, I'm
16 finding that they are not identical. So consequently, I am
17 going to grant the Defendants' Motion to Compel.

18 Now, I think I'm correct about this next statement
19 and if I'm not even giving you a chance to address it, even
20 though I don't want to really entertain argument here this
21 morning. The Defendants' Motion to Compel, I think requested
22 fees, the plaintiffs in their memoranda, and their motion to
23 compel, I don't believe requested fees. But from my vantage
24 point - and keep in mind, I haven't reviewed an affidavit
25 regarding attorneys' fees. So I'm making an assumption here,

1 and my assumption may be incorrect. But it appears on its
2 face, at least, that I've granted each party's Motion to
3 Compel and it seems to me, that it is then unnecessary for me
4 to consider respective claims for attorneys' fees because in
5 essence, it's reasonably likely that they will cancel one
6 another. So consequently, I'm inclined not to award fees on
7 either motion, but I do recognize - I make that statement
8 without the benefit of having reviewed affidavits in support.

9 That's the matter on which I'm going to rule. What
10 do you think the chances are you can submit to me one order
11 that will contain the substance of that determination?

12 MR. STRASSBERG: We'd be happy to attempt to do
13 that, Your Honor. I think we can do it.

14 MR. HOBBS: One order with respect to all three?

15 THE COURT: Yeah. Do you see any problem about
16 that?

17 MR. HOBBS: I don't.

18 THE COURT: Okay. What if I gave you 10 days from
19 today to get that submitted to me. If that fails, then the
20 prevailing parties will submit the proposed order consistent
21 with Rule 7(f). Okay?

22 MR. HOBBS: Uh-huh (affirmative).

23 THE COURT: Oh, one last item. My clerk is
24 bringing to my attention. I keep forgetting the issue of
25 mediation in this particular case. Now keep in mind that

1 right at this moment, I don't have before me the case
2 management order which I'm assuming is in place in this
3 particular case. I'm going to be honest with you. I really
4 don't have the time to get it right now, because I'm really
5 pressed - a very tight calendar this morning, but I wanted to
6 discuss with you - and I don't think we've had this
7 discussion yet. I've changed my process in handling civil
8 cases a couple of months ago and that change has resulted in
9 me building into civil cases at the time the case management
10 order is entered a requirement that the parties participate
11 in good faith in mediation in an attempt to resolve the case
12 and share the expenses of mediation. I want to build that
13 mandatory requirement into this particular case, but I would
14 need your input as to when the most appropriate and most
15 effective time would be for building in such a requirement.
16 Who wishes to take a stab at that first in terms of when the
17 appropriate time would be? Silence.

18 MR. HOBBS: Judge, this is Lincoln Hobbs. We have
19 about - oh, less, about two weeks more until discovery
20 cutoff.

21 THE COURT: Okay.

22 MR. HOBBS: At the conclusion of discovery cutoff,
23 I anticipate filing a motion to dismiss on behalf of Mr.
24 McCandless and C.W. Management. I don't know whether it
25 would be appropriate for that to be filed and then have

1 mediation, or filed and heard, and then mediation because
2 obviously, the plaintiff's counsel are going to disagree with
3 my prospects on that, but I think my prospects with respect
4 to Mr. McCandless and C.W. Management are pretty good. That
5 having been said, you know, I would realize upon filing a
6 motion, it may very well be tonight. So I mean it seems to
7 me that, from my perspective - and I jumped in because of the
8 silence - it would seem to me be after the discovery cutoff
9 and after filing that motion, but before it's ruled upon.
10 And I guess we could leave it to the plaintiffs to decide if
11 they wanted to file a responsive pleading for the mediation
12 or not.

13 MR. STRASSBERG: On behalf of the plaintiffs, Your
14 Honor. That's fine with us if Mr. Hobbs intends to file that
15 motion. I don't think we care too much one way or the other
16 with respect to the timing of filing a response. I think it
17 would effectively address whatever issues he may be raising -

18 THE COURT: Now, then -

19 MR. STRASSBERG: - either in a brief or just orally
20 through the mediation. So -

21 THE COURT: The only preference I would have, and
22 it's - the only preference I would have is that at a minimum
23 that the motion be filed prior to mediation. So whoever
24 performs the mediation can at least have that in their - on
25 the radar screen as these discussions occur. Now, with that

1 stated, I'd like to set an order before a date this morning.
2 What would be the appropriate time to set that? In other
3 words, it could be a date that mediation would be required to
4 be complete on or before a certain day.

5 MR. HOBBS: Jumping in again, Your Honor. This is
6 Lincoln Hobbs. My only thought on that would be - in theory
7 we could do it in December. I'm going to be gone for a good
8 portion of December. Plus, December is December with all of
9 - with everything that carries with it. I would think pick
10 sometime mid-January.

11 THE COURT: So if I were to say - just a second.
12 On or before Friday, January the 19th?

13 MR. STRASSBERG: Fine with the plaintiffs, Your
14 Honor.

15 THE COURT: Okay. What will happen, is my clerk is
16 going to send you a minute entry and order with that
17 mediation date requirement in it. Okay?

18 MR. HOBBS: Okay.

19 MR. STRASSBERG: Okay.

20 THE COURT: All right. Hey, listen. Thank you
21 very much.

22 MR. STRASSBERG: Thank you, Your Honor.

23 MR. HOBBS: Thank you.

24 THE COURT: Okay, bye.

 (Whereupon the hearing was concluded) ed) -c-

CERTIFICATE

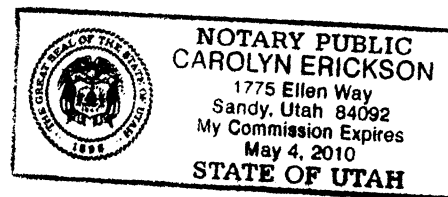
I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceedings held before Judge Thomas Medley transcribed by me from a Record Player recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 19th day of November, 2006 in Sandy, Utah.



Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2010




Tab 2

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Telephone (801) 328-0808

FILED DISTRICT COURT
Third Judicial District

DEC 28 2006

By  **SALT LAKE COUNTY**
Deputy Clerk

Attorneys for Plaintiffs Dennis and
Marilynn Moler

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY**

DENNIS MOLER, an individual, and)	
MARILYNN MOLER, an individual,)	
)	
Plaintiffs,)	
v.)	ORDER ON
)	MOTIONS TO COMPEL AND
)	MOTION FOR PROTECTIVE
)	ORDER
SUNRISE CAPITAL CORPORATION, LLC,)	
a Utah Limited Liability Corporation,)	Case No. 060902661
CW MANAGEMENT CORPORATION,)	
a Utah Corporation, CHRISTOPHER)	Judge Tyrone Medley
McCANDLESS, an individual, FRANKLIN)	
HOMES, INC., a Utah Corporation, and)	
QUINN HEDER, an individual,)	
)	
Defendants.)	
)	

On November 6, 2006, the following motions came before the Court: (1) Defendants Franklin Homes, Inc., Sunrise Capital LLC, Christopher McCandless and CW Management Corporation's Motion for a Protective Order ("Defendants' Motion for a Protective Order"); (2) Defendants' Joint Motion to Compel the Testimony of Dennis Moler and Wendy Moler-Lewis and for an Enlargement of the Length of Time of the Deposition of Dennis Moler ("Defendants' Motion to Compel"); and (3) Plaintiffs Dennis and Marilyn Moler's First Motion to Compel ("Plaintiffs' First Motion to Compel"). Having considered the memoranda submitted by counsel

and having heard oral argument, the Court hereby DENIES Defendants' Motion for a Protective Order and GRANTS both Defendants' Motion to Compel and Plaintiffs' First Motion to Compel.

With respect to Defendants' Motion for a Protective Order, the Court finds that there was no violation of Rule of Professional Conduct 4.2. That Rule expressly states that when the represented person is an organization, an individual is represented by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication. In this case, Mr. Cannon elected to be represented by his own counsel and, therefore, the contact that occurred between Strassberg & Ensor and Mr. Cannon, through his retained counsel, was not in violation of Rule 4.2(d). In addition, while the Court has been invited to exercise its inherent power and authority to manage the practice of law before the Court and the officers of the court, the Court finds insufficient grounds to exercise such discretion in this case. The express language of Rule 4.2(d) attempts to strike a balance between competing interests, which balance this Court believes is appropriate. To the extent Rule 4.2 is not clearly expressed, it is a problem for the rule makers and not this Court. While there may be a set of circumstances where the Court's inherent authority should be exercised, the Court finds that this case does not present such a set of circumstances. Nevertheless, the Court finds that Defendants' Motion for a Protective Order was not frivolous, not meritless, and not made lightly, and that it was appropriate for Defendants to provide the Court with an opportunity to decide whether to exercise such inherent authority. The Court therefore denies Plaintiffs' requests for attorney's fees and costs.

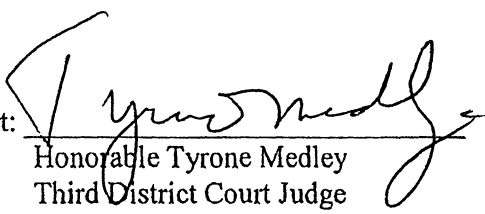
With respect to Defendants' Motion to Compel, the Court grants the motion, including an enlargement of two hours to continue the deposition of Dennis Moler. The Court finds that communications between Mr. Moler and his daughter, Ms. Wendy Moler-Lewis, are not

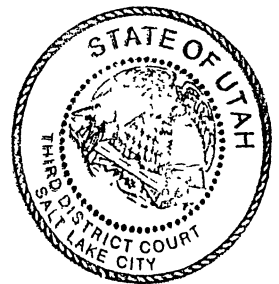
protected by the attorney/client privilege. Ms. Moler-Lewis did not provide legal advice based upon Mr. Moler's own admission during deposition testimony that he is not her client. The Court would also find that, even if the attorney-client privilege did exist, Mr. Moler waived the privilege in his deposition. The Court further finds that Ms. Moler-Lewis cannot be considered Mr. Moler's agent for purposes of this litigation because the Court cannot find that she was necessary for the retention of legal advice or essential to Mr. Moler's legal representation. It is also suggested by Plaintiffs' counsel that the common interest doctrine applies in this particular case. From the Court's review of the cases cited, the controlling authority requires that the common interest must be identical. In the Court's opinion, Ms. Moler-Lewis' interests and Dennis Moler's interests are not identical in this case.

With respect to Plaintiffs' First Motion to Compel, the Court grants that Motion because it is satisfied that in light of Plaintiffs' pleadings in this matter, particularly their fraud claims, that this request is reasonably calculated to lead to admissible evidence, which is the relevant standard. Additionally, the Court is not persuaded by Defendants' position that this request seeks irrelevant documents or that this request is unduly burdensome. The Court is concerned about the breadth of the requests and, in granting this Motion, limits the request to discovery of only those files that are known to contain Redfeather Estates documents. The Court declines to grant the costs and attorney fees incurred in bringing Plaintiffs' First Motion to Compel.

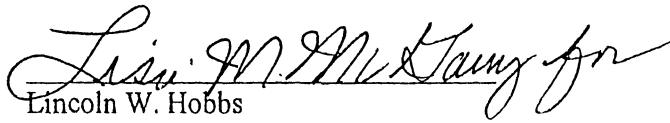
SO ORDERED this 28 day of Dec, 2006

By the Court:


Honorable Tyrone Medley
Third District Court Judge



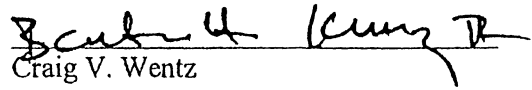
Approved as to form:



Lincoln W. Hobbs

HOBBS & OLSON

Counsel for Defendants McCandless and CW Management Corp.

 12-20-06

Craig V. Wentz

Barton Kunz

CHRISTENSEN & JENSEN

Counsel for Defendants Franklin Homes Inc., Quinn Heder, and Sunrise Capital, LLC